

United States Bankruptcy Court

Eastern District of Washington

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DATE: March 23, 1999

FROM: Ted McGregor

TO: Members of Standing Advisory Committee; Judge Rossmeissl, Judge Klobucher, Judge Williams, Jake Miller, Ford Elsaesser, Dan Brunner, Ian Ledlin, Nancy Isserlis, Rolf Tangvald, Bruce Boyden, John Powers, Jim Hurley, Rick Hayden

SUBJECT: Report on Meeting of Standing Advisory Committee

The Standing Advisory Committee met in Yakima on March 5, 1999. Members and invited guests present were Chief Judge Rossmeissl, Judge Williams, Nancy Isserlis, Jake Miller, Dan Brunner, Ian Ledlin, Rolf Tangvald, Jim Hurley, Joe Harkrader, Bev Benka, Tap Mennard and Ted McGregor. Members not present were Bruce Boyden, John Powers, Ford Elsaesser, and Rick Hayden.

The meeting was called to order by the co-chairpersons at 10:00 a.m. Chief Judge Rossmeissl said that he felt the court is operating well in the Yakima area. He noted that emphasis was continuing to be placed on confirmation issues in chapter 13.

Judge Williams reported that the court in Spokane is also doing quite well. She did relay that John Powers, who was unable to attend the meeting, had shared with her that increased filings of chapter 11s from mid to late 1999 might be expected.

Nancy Isserlis, President of the Association, reported that it has been a fairly quiet year thus far. The Sun Mountain Retreat is set for June 10-12, 1999. Featured speakers will be Samuel Gerdano, Executive Director of the American Bankruptcy Institute and Ford Elsaesser, President of the ABI. A fall seminar is also scheduled to be hosted by the Association in the Tri-cities, with a national speaker expected to be present. She noted the sad state of the farm economy, particularly for the apple and pear farmers that may lead to increased filings, particularly chapter 12s.

Ted McGregor reported that filings appear to be leveling off in 1999, however, an 11% increase was reported from 7018 in 1997 to 7795 in 1998. The increase from 1996 to 1997 was 36%. He explained that the operating standards established by the Clerk's Office relating to the time required to accomplish various functions were generally being met. He explained that even in the

face of rapidly expanding filings this was able to be accomplished by the use of automation, and not simply increasing the size of the workforce. Some of the initiatives introduced have been to automate the granting of discharges, an infra-red connection with the Chapter 13 trustee's office, the employment of a second frame relay between Spokane and Yakima, and increased information available on the internet via the court's website at www.waeb.uscourts.gov. The court is also developing a digital sound recording system, dubbed EARS, which is part of a national pilot project in testing digital versus analog recording of court hearings.

He noted that the Chapter 13 files assigned to Judge Rossmeyssl will be located to Yakima once an additional employee is hired at the Yakima site.

He also reported that concerns are being voiced concerning the judiciary's prospect for the coming fiscal year in addressing possible budget short falls. The strategy adopted by the court is to become more efficient and yet cut costs by the use of automation as much as possible. The request to have kiosks installed in both Yakima and Spokane to permit after-hours filing was declined due to cost considerations. The costs estimated were exceeding \$10,000.

He reported that proposed changes to the national rules referred to as the "litigation package" did not appear to be moving forward after the very unified concerns expressed by bankruptcy judges and clerks. He distributed a handout entitled "Access in a Nutshell," which identified the broad range of court services and how to access them.

Dan Brunner reported on the activities of the Chapter 13 office, indicating that they are introducing more automation all the time, such as the office is now linked with the Clerk's Office by infra-red; they were participating in a national study on the use of imaging technology; and the creditor "dial up" system is on line and working. He also gave a brief report on the "summit process," which was established to review the confirmation process. He reported that there are now less than 600 unconfirmed cases pending, and of that number only 48 were between 180 and 270 days old, and only 24 cases were in the over 270 day category. He noted that a reasonable goal would be to maintain under 600 total cases, with less than 10 being over 270 days old, and less than 24 being between 180 and 270 days. He also announced that Bev Benka, presently Judge Klobucher's law clerk, will be joining his office effective March 18, 1999.

Jake Miller provided an update on the activities of the Office of the United States Trustee, reporting that the office is now celebrating its 10th anniversary. He related that the program was designed to be self funded, and until Chapter 11s began to drop off, enough revenues were generated to not only fund the program and put money into a reserve account, but actually pay money into the general fund of the treasury. He reported that Congress has been reluctant to allow the program to access its reserve account.

Jake noted that the Eastern district of Washington is one of the most aggressive districts in the nation in dealing with 707(b), Substantial Abuse issues. He opined that due to the pending legislation, if so-called means testing should be enacted into law, the office will perhaps be more ready than others. Judge Rossmeyssl noted that the greatest activity in this area is in the Tri-Cities.

Jake also explained an audit program that he has initiated which involves conducting an audit on approximately one out of every 100 Chapter 7 cases, randomly selected. The program involves requesting detailed information concerning the selected cases.

Judge Williams, in a related area, described her participation in a study conducted by the NCBJ (National Conference of Bankruptcy Judges) in which she reviewed 150 randomly selected Chapter 7 cases. One item she noted was that in none of the cases reviewed involving a single parent, was any income or expense reported concerning either alimony or child support. Jake observed that this may be explained that the debtors do not understand the questions asked on the income and expense schedules.

Jim Hurley observed that proposed changes in the bankruptcy laws may lead to an increase in what he termed as the "unreported" category. Perspective debtors would receive unreported income and thus be able to sidestep required Chapter 13 means testing.

Jake finished his report with a note on petition preparers. He noted that other courts have dealt with this issue by local rules or standing orders that frequently limit the amount of compensation such persons may charge. He noted that in the Eastern District of Washington that there are two persons who are the most active petition preparers. Jake noted that he monitors this area and anticipated that the number of pro se filers may increase.

Nancy Isserlis then reported on Pro Bono. She said that she is now the Regional Directing Attorney of Columbia Legal Services, Spokane branch, and they are using CLEAR as a spring board. A bankruptcy informational session is conducted monthly, which includes the showing of a short video presentation.

She indicated that the state District Courts under the broad category of restorative justice, are attempting to deal with the circular problems such as no drivers license, no job, and with no job, no way to ever get the license back. One of the tactics they are employing is to refer such persons to attorneys who might discuss whether or not filing a Chapter 13 would be appropriate.

She also noted that another area of interest was in the area she described as "predator creditors"; creditors who target low income individuals and encourage them to take out second mortgages, even where there is little or no equity, charging high interest rates and set up fees, which result in a high rate of defaults. This practice is applied to both sellers and buyers. Another area of interest are secured creditors who run up collection fees, even when there are no assets from which a judgement could be enforced. Another issue being looked at is representing pro se debtors in dischargeability actions. It was also reported that in Yakima a legal referral service is operated by the YWCA, which tries to match a lawyer to the problem. She reported that this program seemed to work quite well. She also made reference to the Sears cases involving collection on discharged debts without adherence to the reaffirmation process which generated some 500 million dollars in refunds, but 60 million dollars in attorneys fees.

Nancy reported that one phenomena that seems to occur is once a debtor has an attorney, the balance of power shifts very quickly from the creditor and the positions of the parties tend to

become more equal.

Judge Williams addressed Alternate Dispute Resolutions (ADR). She explained that a recent change in a federal statute mandated that District Courts adopt ADR plans, but there was some question as to whether the statute applied to Adversary Proceedings. She noted that this was an "unfunded requirement," although funds might become available for some purposes in the future. The District Court has drafted a plan in the form of a rule, and Judge Williams reported that she had reviewed it and made various adjustments to tailor it to Adversary Proceedings. The focus most likely will be on mediation, rather than a broad range of Alternate Dispute Resolution options. She suggested that the issue be addressed by the committee, and it was determined that the method for doing this was to appoint a sub-committee. On the sub-committee will be Judge Williams, Tom Bassett, Jim Hurley, John Powers and one additional member to be selected by Nancy Isserlis. The charge of the sub-committee is to try to determine the general feelings of the bar as to such a program, whether or not members would be willing to provide pro bono assistance and whether or not members would use such a service. This is an opportunity for the bar to have real input. Judge Rossmeyssl also asked if this could be used in the area of providing service to unrepresented debtors. Ian inquired as to what training might be required, how it would be funded, and whether or not the process would reduce the costs of obtaining resolution of issues.

Ian Ledlin reported on the work of the Fees Sub-committee. He reported that the sub-committee had met and is working on modifications to LF 2016. He indicated that attorney disclosure compensation was an item of interest, and also that they were trying to have only one form to cover all situations, but that two forms might make more sense. The goal is to provide adequate information to reviewers, yet maintain simplicity and ease in completing.

It was agreed that Ian, Gary, Dan and Ted would work to put the final touches on a draft form or forms and that they would have the draft ready for consideration at the **next meeting of the Fees Sub-committee set for a telephone conference at 9:00a.m. on Monday, April 19, 1999.**

Judge Rossmeyssl noted that there seems to be a need for a comprehensive overall study in the fee area to ensure that the gaps that exist between statutes and rules are addressed. He envisioned this as a long term project to eliminate as much as possible, the uncertainty created.

Judge Williams inquired as to whether the bar felt that the ability to be awarded fees in bankruptcy cases was too cumbersome. Ian indicated that it is a complicated process, that the approval process ought to be speeded up, and noted that there was some delay in the Chapter 13 area. The Chapter 13 trustee now reviews all fee applications in Chapter 13 cases, and since this change was made there has been some build up of cases in the review process. Ian asked why some of the applications needed an independent review at all, and felt approval ought to be immediate. Tap Mennard noted that he felt that some independent review is required. Nancy asked if the problem is a substantive problem, or is it just the time it is taking to do the review. Ian indicated that in his opinion, the delay is the problem. Joe Harkrader said, in his observation from reviewing applications, that the applicants are in fact spending the time reported, but the questions raised are why the work was taking so long, (was there a proper relationship between value received and

amount charged). Jake Miller noted that the form itself is not a "good" form and turns people off. Jake suggested that perhaps a "forms" expert should be consulted to ensure that the form is as clear as possible.

Dan raised the issue of dealing with fees in cases that are dismissed or converted without confirmation and suggested some changes to the Chapter 13 portions of LBR 2016-1. Judge Rossmeyssl noted that the present rule does not require notice. Judge Williams observed that the rule does not only apply to unconfirmed cases. Rolf opined that perhaps other creditors have an interest in getting notice so that they could exercise garnishment or levy rights. Ian said that he would put together a notice that might be satisfactory. Nancy asked if the issue was really an informational one, and not required by a rule. Judge Williams noted that the debtor's attorney perhaps by using the tools at hand could reach a solution, and that it was really a problem best resolved by the attorney. Ian also indicated that perhaps there should be a separate standard for confirmed and unconfirmed cases, for instance, a \$1,000 fee for confirmed cases and a \$500 fee for unconfirmed cases.

The discussion then turned to modification to the form plan suggested by Ian and Dan. Ian presented his suggested change to use the priority scheme set out in 11 U.S.C. 503. Jake noted that this was a very significant change, and would not lead to simple pro rata distribution of the 8 different classifications, but would have more far reaching implications. The consensus of the group seemed to be to keep this area as it was already in the plan. Dan explained the various changes he suggested. Ted McGregor raised issues about the Plan Payment Declaration indicating that the proposed changes did not operate from the basis that income directives were the norm and not the exception. He invited the members to consider changes he had drafted which he felt more clearly addressed the income directive changes. Dan indicated that he would redraft the changes to the plan and give them to the Claims Sub-committee members by late April.

Ted introduced proposed changes to LBR 3001, and the group agreed that the two changes suggested to this form, to wit: eliminate the need for a second copy of a claim to be filed subsection (a) of LBR 3001-1, and to eliminate sub section (d) of the rule which requires a claimant who wishes a copy a filed proof of claim returned to provide a self addressed envelope, as being redundant of LBR 5005-1, were good.

The suggested amendments to LBR 3007-1 and 3012-1 to require that if an objection to a proof of claim is based on valuation of security, the objecting party must meet the requirement of both 3007-1 and 3012-1, was generally accepted as a good idea. However, the suggestion that service of the motion to value security in the case where the holder has filed a proof of claim be sent only as set out and designated on the proof of claim was vigorously objected to by Rolf. He indicated that if this practice were adopted, the correct parties in the government would not receive the proper notice. He pointed out that FRBP 9014 required that any contested matter needed to be served in accordance with FRBP 7004. This portion of the suggested changes was discussed for some time, and left without definitive resolution. Attached to this report is a letter from Rolf that addresses his concerns. The sub-committee on claims will address these issues at its next meeting.

Following this discussion and wrap up comments by Judge Rossmeyssl, the meeting was

adjourned. The next meeting of the sub-committee will be in conjunction with the June retreat at Sun Mountain. Most likely the meeting will occur on Thursday, June 10, 1999, with the exact time to be announced. One item on the agenda for the June meeting will be the rotation of members. Two positions are due to expire, that being the Debtor-Consumer seat, now occupied by Ian Ledlin, and the Creditor-Consumer position, now occupied by Rick Hayden.

Assignments resulting from this meeting are as follows:

- A. The Fees Sub-committee will continue; Gary, Dan, Ian and Ted will draft changes to LF 2016 and a proposed related order.
- B. The Claims Sub-committee will continue; Dan will draft changes to LF 2083, the Chapter 13 Plan and associated documents.
- C. An ADR Sub-committee was formed with Judge Williams, Jim Hurley, Tom Bassett and John Powers as members, plus one additional member to be selected by Nancy Isserlis.
- D. The Claims Sub-committee will review proposed changes to LBR 3012-1 and 3007-1.